No. 17933

United States Court of Appeals

FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE, *Appellant*,

vs.

E. L. FRANCE, TBUSTEE, *et al.*, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION NO. 1183

THE HONORABLE GEORGE D. BOLDT, *Judge*

BRIEF OF APPELLEE CITY OF TACOMA

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NATURE OF THE CASE

Inasmuch as there are four briefs being filed by the appellees in this action, a restatement by each of the appellees would serve only to lengthen unduly the briefs and records in this cause, the appellee City of Tacoma therefore adopts the statement of the nature of the case set forth on pp. 1 through 4 of the Brief of the Appellees Hulda S. Carlson, et al., heretofore filed in this cause, with the following supplemental statement.

The interest of the City of Tacoma in and to the land in dispute was acquired for and is presently used as a part of a hydroelectric project furnishing electric power to the City of Tacoma and its inhabitants. The

installations in the main consist of a portion of the tailrace from the powerhouse located on the uplands, together with high tension transmission lines across portions of the area in question. (Tr. 583-607, incl.)*

A portion of the City's facility is located in Section 26, referred to throughout these proceedings as a portion of the Fisher Homestead or Fisher Donation Land Claim. The facilities of the City of Tacoma were duly licensed by the Federal Power Commission and bear license No. 460. (Tr. 591; Defendants' Ex. A-61.) The facilities in question were constructed from the period 1923 to December 31 of 1930 (Tr. 584, 585) and have been in continuous operation ever since that time, which dates, incidentally, antedates substantially the filing of the Complaint in the above-entitled action and, as a matter of fact, antedate the organization of the Skokomish Indian Tribe under a constitution and bylaws adopted by the Tribe on April 2, 1938. (App. Br. p. 27; Ex. 1 and 2.)

ARGUMENT IN ANSWER TO APPELLANT

The appellee City of Tacoma asserts in defense of the above-entitled action and in support of the trial court's findings most of the same defenses of the other appellees. In order to avoid needless and undue repetition, this appellee therefore adopts the arguments in answer to the appellant contained in the Brief of appellees Hulda S. Carlson, et al., as set forth in pp. 5 to 31 of said Brief. In addition to the adoption of said argument, however, this appellee would expand

*All reference to Transcript pages are to page numbers at top of the page of Volumes II and III.

upon one issue of the argument set forth therein, that is, the Indian use and occupancy of the land in question in ancient times; and further, would and will assert an argument peculiar to this defendant, that is, that the claim of the appellant constitutes an impermissible collateral attack upon the decision of the Federal Power Commission in setting forth and granting the terms and conditions of the Federal Power License to the appellee City of Tacoma, and that the submission by the City at the time of construction of its hydroelectric facilities of the plans and specifications regarding the construction, the details of land acquisition of Indian lands in the Skokomish reservation, the proposed location of the facilities, and the subsequent approval thereof by the Secretary of Interior, acting by and through the Bureau of Indian Affairs, is res judicata and binding upon the predecessors in interest of and the appellants in this cause. The appellee will further demonstrate hereafter that the defenses of laches and estoppel are and should be available to this appellee because of the peculiar circumstances involved in the construction and maintenance of the hydroelectric project and the approval thereof by the United States Government.

INDIAN USE AND OCCUPANCY

The Brief of appellees Hulda S. Carlson, et al., on pp. 14 through 17, incl., dwells on the question of Indian use and occupancy. The evidence and testimony cited in that portion of the brief establishes conclusively that the Skokomish Indians were river people concerned with living on rivers and creeks where

salmon would run. That portion of the brief further demonstrates that the Indians did not rely upon the tidelands in question for the procuring of shellfish sufficient to meet their needs. As a matter of fact, not only the writings of Professor Elmendorf, but the testimony of the appellant's witnesses in the trial of this cause, demonstrate conclusively that with reference to the procuring of shellfish the Skokomish Indians were nomadic in nature. That is, they would procure shellfish at many and various locations, most of which were far removed from the lands in dispute. The appellee City of Tacoma believes that a somewhat detailed relating of the evidence and testimony of these witnesses will be of assistance to the court in arriving at the inescapable conclusion that the tidelands in question were not utilized, except occasionally, for the procuring of shellfish.

One of the first witnesses of the appellant was a Mr. Archie Adams. His testimony with reference to fishing, trapping, and digging clams, and the location of such activities is as follows:

> "Well, away from the mouth of the river, across the bay, and all the way up the Canal." (Tr. 56, lines 12, 13.)

And Mr. Adams testified with reference to the taking of herring prior to the coming of the white man in response to a question as to where the Indians took them:

> "Oh, mostly Union." (Tr. 75, line 24.)

And, in answer to a question as to where his grandfather fished and trapped, he stated:

> "Yes, practically all over the canal there in canoes." (Tr. 96, line 15.)

And Mr. Adams, when questioned concerning his digging of clams in Hood Canal, stated that a good clam digging area was at the far end of the Canal where the Union River enters the Canal. (Tr. 113, 114.)

The witness, Emily Purdy Miller, testifying concerning the procuring of butter clams, in response to a question as to where people dug butter clams, stated:

> "There was not only one place, but they went where there was the most clams, because there have to be enough to smoke. That is all along the beaches wherever there is the best place, you see a bunch of people there just digging." (Tr. 168, lines 16 to 20.)

And Mrs. Miller testified concerning her digging of clams as a young woman, stating that she dug in various places wherever she could find a nice place that she could dig and where she could get the most clams (Tr. 194, 195), and testifying concerning the olden days, she stated that the places they used to go in the winter time to get raw clams was up to and beyond the town of Union, that the Indians wanted to get clams easily and to get the good ones and they would go east from Union city, that some of the clam beds were a few miles east of the reservation and the Indians went there by canoe, that she herself had gone up by canoe in this area. (Tr. 206.)

The testimony of Mrs. Louise Pullsifer, one of the oldest living members of the Skokomish Tribe, also

bears out the contention of the defendants that the procuring of clams and shellfish by the Skokomish Indians was nomadic in nature, that is, the Indians ranged from one end of Hood Canal to the other, digging and procuring clams and shellfish at those spots where the same were most easily procured. Mrs. Pullsifer testifying concerning the procuring of ducks and clams stated:

> "There is lots of places where they used to go and dig their clams and get their ducks. Of course, the ducks was just full around that canal up to Belfair, clams all around that place where all the Indians used to travel around there from Skokomish." (Tr. 278, lines 21 to 25.)

and again, in response to a question as to when the people went up towards Belfair:

> "Yes, for fishing and ducks and clams towards Belfair." (Tr. 290, line 5.)

She further testified that salmon was the main food fish that the people ate in the days when she was young. (Tr. 290.) And again, in response to the following question:

> "Do you remember that the best clam beds were east of Union up towards Belfair?
>
> "A. Yes, towards." (Tr. 290, lines 22 to 24.)

She further testified that in the early days her family went down to a town called Port Gamble. They used to go by canoe. They would stay two or three months, working in the mill, and during this time those who were not employed in the mill would fish and dig clams. That there were good clam beds all over the Port Gamble area. (Tr. 299.)

The excerpts set forth in full are but a few of the many statements of the witnesses, all of whom conceded that the Indians ranged up and down Hood Canal from the closed end of the Canal near the present town of Belfair toward the mouth of the Canal in the vicinity of Quilcene in order to procure shellfish. Indeed, the actions of the ancient Indian were not in the last analysis much different from the acts and actions of the present-day sportsman, that is, traveling to the place, irrespective of where it may be, where the game or food sought is most abundant and most easily procured. There is no evidence whatsoever by any witness that the tidelands here the subject of dispute furnished the most abundant and most readily available supply of shellfish. Quite the contrary appears. We wish to suggest that the testimony of these witnesses with reference to the best clam beds being near Belfair and further up the Canal substantiates in a large measure the testimony of Dr. Jerome E. Stein (Tr. 451), regarding his study of clams in the area in question and the effect of the fresh water from the Skokomish River on the salinity of the waters of Hood Canal and its adverse effect upon the abundance of clams in the area.

Dr. Stein testified that he made a careful scientific study of the tidelands here in question for clam life. He actually made "digs" for clams throughout the area involved at more or less regular intervals of fifty yards, at a time when the tide conditions were relatively favorable. (Tr. 581.) He made a total of 134 "digs" ranging in area from one square foot to two square yards. Of the total number of "digs" only fif-

teen produced any clams whatsoever. (Tr. 586.) He also stated that in his professional opinion, the relative scarcity of clams in this area would not be materially changed between the time of the treaty and the time of his investigation. (Tr. 630.)

Exhibit A53 is a summary chart of the results of Dr. Stein's investigation. It shows the number of each variety of clams found in each dig, the digs being identified as "sample no.," and by reference to Exhibit A51, the location of these digs can be determined. The total number of clams found by Dr. Stein was 309 from all of the 134 digs. However, of this total number only the rock clams and butter clams were native to the area—the other varieties being imports brought in around the turn of the century. The total native clams found in all of these digs was only 36. The testimony of the Indian witnesses as to their own clam digging would have little weight in view of Dr. Stein's investigation, since, of course, they didn't know whether they were digging native or imported clams.

STATE ACTION RES JUDICATA

The appellee City of Tacoma and the appellee Marcus Nalley, as well as several other parties to this proceeding, were named defendants in an action instituted by Judge Charles E. Wright to quiet title to certain of the lands here in question, which action was at the time of the trial of this case still pending in the Superior Court of the State of Washington. The appellee City of Tacoma submits that the State court had first assumed jurisdiction of the lands in question, and hence this proceeding was barred or should have

been stayed. The appellee City of Tacoma hereby adopts by this reference, in order to avoid repetition, the arguments set forth in the Brief of the appellee Marcus Nalley.

PROCEEDINGS BEFORE THE FEDERAL POWER COMMISSION ARE BINDING UPON THE APPELLANTS

As the evidence in this cause has indicated, the appellee City of Tacoma has constructed as part of its publicly owned electric utility a power arch dam, powerhouse, tailrace, and transmission line facilities in the area of and upon the land in question. The part of the project covering the lands in dispute consists in the main of the tailrace from the powerhouse and transmission line facilities.

At the very outset, it might be noted that the use of the property by the appellee City of Tacoma did not and does not interfere substantially with, nor is it inconsistent with the use of the property as testified to by the witnesses of the plaintiff. The evidence indicates that the transmission lines, although high voltage lines, are some 50 to 80 feet above the surface of the ground and do not in any manner interfere with the gathering of shellfish, if any exist, or walking on the beaches and marshes in question. (Tr. 356.)

The appellee City of Tacoma operates its hydroelectric projects pursuant to authority granted municipal corporations in the State of Washington by the laws of the State of Washington, and particularly RCW 35.92 (formerly Ch. 80 RCW). RCW 35.92.050 provides as follows:

"A city or town may also construct, condemn and purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together with the right to handle and sell or lease, any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof."

In addition to this statutory authority, as to this particular plant the City of Tacoma further operates the same pursuant to the laws of the United States of America, as evidence by the issuance of a license to operate said plant by the Federal Power Commission. (Ex. A-61.) This plant has been in operation continuously since the 31st day of December, 1930. (Tr. 584.) The transmission lines across the portions of the property subject to this action were constructed prior to this time.

The construction, operation, and maintenance of hydroelectric projects over, along, upon, and across lands over which the United States has control or jurisdiction are subject to the provisions of the Federal Power Act. 16 U.S.C.A. 791(a), et seq.

16 U.S.C.A. 796 sets forth certain definitions for the purposes of the Federal Power Act, defining among other things the following words:

"(1) 'public lands' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include 'reservations,' as hereinafter defined;

"(2) 'reservations' means national forests, *tribal lands embraced within Indian reservations*, *military reservations*, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

"(9) 'municipal purposes' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

"(11) 'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,

> all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit"; (Italics supplied.)

The following sections of the Federal Power Act, namely, 16 U.S.C.A. 792, 793, 794, and 795, establish the Federal Power Commission, which body administers the provisions of the act. 16 U.S.C.A. 797 sets forth the general powers of the Federal Power Commission. These powers generally and, in some instances, specifically are as follows:

(a) To make investigations and to collect and record data concerning the utilization of water resources.

(b) To determine the original cost and the investment in licensed projects, to require filing of statements showing the actual cost, etc.

(c) To cooperate with the executive departments and other agencies of State or National Governments in the investigations.

(d) To make public from time to time information secured, provide for the publication of reports and investigations.

Paragraph (e) of Sec. 797 authorizes the Commission to issue licenses, providing as follows:

> "(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any

State or muncipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and *reservations* of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired,* and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further,* That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license

> therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection." (Italics supplied.)

Subsection (f) authorizes the issuance of preliminary permits, enabling applicants for licenses to secure data and perform certain acts, and (g) provides that the commission on its own motion may order an investigation of any occupancy or intended occupancy of any lands over which Congress has jurisdiction, and to issue such orders as it may find appropriate and expedient, and in the public interest to conserve and utilize navigation and water power resources of the region.

Section 803 of Title 16 provides for the conditions of license generally and, among other things, in subsection (e) thereof provides that the licensee shall pay license fees. This section provides as follows:

> "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795—818, and 820—823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation

thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any

> license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period."

A reading of the statutes cited and quoted above clearly indicates that Congress has provided a procedure for the construction, maintenance and operation of hydroelectric projects over waters and lands within its jurisdiction, including tribal lands within Indian reservations. Assuming for the purposes of argument that the lands in controversy are, in fact, tribal lands, then there can be no question but what such lands are subject to the provisions of the Federal Power Act, and the Federal Power Commission, when all of the plans and specifications of the Tacoma project were before it, knew or should have known of the existence of the tribal lands. The Commission duly issued its license and provided such license fees as it felt proper in view of the existing circumstances at the time of the application. If the Federal Power Commission, at the time of the issuance of its license to the City of Tacoma, through error or inadvertence, overlooked the ownership of tribal lands, then the appellant's claim is and should have been against the decision of the Federal Power Commission, rather than against its licensee.

16 U.S.C.A. 825L provides the remedy for persons aggrieved by an order of the Federal Power Commission. This section provides that any person, state, municipality, or state commission aggrieved by an order issued by the Commission in a proceeding under this

chapter may apply for a rehearing within 30 days after the issuance of the order. Said section further provides in subsection (b) thereof that any party aggrieved by an order issued by the Commission may obtain a review of the order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, by filing in such court within 60 days after the order of the Commission a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Thus, it would appear that, had the Skokomish Indian Tribe felt aggrieved at the decision of the Federal Power Commission in issuing a license to the City of Tacoma for its project on the Cushman River, and had the Tribe felt that proper provision was not made for the compensation or damaging of tribal lands, or had the Tribe felt that the Commission did not properly hold that the tribal lands were, in fact, tribal lands, then this question should have been raised within 60 days after the issuance of the Federal Power Commission license by petition to the Court of Appeals of the United States.

The institution of this action is, we believe, a collateral attack upon an order issued by the Federal Power Commission where the Congress has, in fact, provided a proper remedy by writ of review to the Court of Appeals. This court should not entertain at this late date a collateral attack upon the issuance of a license by the Federal Power Commission.

The Supreme Court of the United States, in a recent case involving the City of Tacoma, discussed specifically the question of impermissible collateral attacks upon rulings of the Federal Power Commission and, in the case of *Tacoma v. Taxpayers*, 357 U.S. 320, 2 L.Ed. (2d) 1345, specifically held that any question which was raised or could have been raised in the Court of Appeals on an appeal from the order of the Federal Power Commission could not at a later time be raised in another court, inasmuch as these were impermissible collateral attacks, the court stating as follows:

> "We think these recitals show that the very issue upon which respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised by the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given exclusive jurisdiction to affirm, modify or set aside the Commission's order, and the state may not reserve the point for another round of piecemeal litigation by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court, which had exclusive jurisdiction of the proceedings and whose judgment therein, as declared by Congress, shall be final, subject to review by this court upon certiorari or certification."

May we summarize for the convenience of this court the chronological order of the events which transpired. Subsequent to the adoption of the Federal Power Act, the City filed its application for a license under this act (Ex. A-61), submitted maps of the section, one of which was introduced into evidence as Exhibit 55.

Some time later, in June, 1924, the Federal Power Commission issued a license to the City of Tacoma for Project No. 460 Washington. (Ex. A-61.) The issuance of this license under the law provided, or should have provided for annual license fees for the use of all lands owned by or under the jurisdiction of the United States of America, including all tribal lands within Indian reservations. No appeal was taken from the issuance of this license to the Court of Appeals as by law provided, and the license has been in existence for over 35 years.

It would seem at the present time that this action by the appellant is an attempt at this late date to collaterally impeach the issuance of the license and the order of the Federal Power Commission, in that the appellant now asks the court to determine that the appellee City of Tacoma has been for almost 40 years a trespasser upon certain lands of the United States which were reserved to the appellant for its use and occupancy. This question is one which the Federal Power Commission, at the time the license was issued, decided, or should have decided. It would seem clear that, if the appellant or its predecessors in interest felt aggrieved at the action of the Federal Power Commission in permitting the City of Tacoma to construct its tailrace across certain tidelands of Hood Canal and to erect transmission lines on a small portion of the tidelands of Hood Canal, then it should have appealed the order of the Federal Power Commission prior to 1924.

The appellant argues that the Skokomish Tribe of Indians, as a corporate entity, was not served with

process or notice of the hearings before the Federal Power Commission. We remind the court, however, that at that time the Tribe was not incorporated in the same manner as it exists today. We again remind the court that the Secretary of Interior and the Bureau of Indian Affairs were duly served with appropriate notices of the hearing, and, in fact, were given the plans and specifications for review and approval. This notice upon the Secretary of Interior through the Bureau of Indian Affairs constituted notice to the Skokomish people. We respectfully submit, therefore, that on this issue the appellant should not prevail, as this matter constitutes an impermissible collateral attack upon an order of the Federal Power Commission, and, under the rulings of the United States Supreme Court in many cases, one of the latest of which is *Tacoma v. Taxpayers*, 357 U.S. 320, 2 L. Ed. (2d) 1345, such an action may not now be maintained.

LACHES AND ESTOPPEL SHOULD APPLY

We respectfully submit that the common law doctrine of laches and estoppel should apply insofar as the appellee City of Tacoma is concerned as against the appellant in this action. While it is admitted that normally estoppel and laches do not apply against an Indian tribe or as against the United States of America, we feel that the circumstances in this case are so exaggerated that the court should consider the application of the doctrine. We would call to the court's attention the fact that the City of Tacoma in operating its municipally-owned utilities is not usurping lands

for a profit-making institution or for private purposes, but rather a municipality furnishing power to its citizens in accordance with the pronounced public policies of the United States of America and the State of Washington. The City at all times acted in good faith, as is disclosed by the evidence in the case. It made due application to the Federal Power Commission for the issuance of a license. It submitted to the Bureau of Indian Affairs all matters relating to its condemnation action for the acquisition against Indian allotments and Indians lands within the project, and received approval of its actions from the Bureau of Indian Affairs. (Ex. A-16, A-17; Tr. 694, 695.) It proceeded to erect and construct power facilities costing millions of dollars, which facilities have a present-day value greatly in excess of their original cost, estimated by the appellee City's witnesses to approximate $30 to $40 million. (Tr. 600, 601.) In addition to the direct value of the facilities, the residents, businesses, industries, and public institutions dependent upon these facilities for power have a value greatly in excess of the cost of the plants themselves.

It would appear unconscionable to now hold that the appellant, after said facilities have been in existence for from 30 to 40 years, is the owner of a portion of the facilities and in a position to render the use thereof null and void.

The evidence also discloses that members of the Tribe at the time the construction was undertaken were well aware of the construction and, indeed, tried to thwart the same. (Ex. A-23; Tr. 696.) In that

action, instituted by some of the Skokomish Indians against the City of Tacoma, no mention was made of the fact that the Indians at that time claimed the ownership to the tidelands in question.

The Supreme Court of the United States has concerned itself with the doctrine of laches insofar as Indians are concerned in some cases. In the case of *Felix v. Patrick*, 36 L.Ed. 719, the court held that laches applied and precluded the heirs of an Indian from reclaiming certain property allegedly fraudulently procured some 27 years before the suit was actually instituted. The court in that case considered the disproportionate value of the land, stating that as of the date the deed was made the land was worth approximately $150.00, and at the time the action was instituted was worth in excess of a million dollars. The court commented upon the disturbing of the security of titles that have existed for generations, and held that the Indian heirs could not recover. We respectfully submit, therefore, that this court should apply the doctrine of laches or estoppel in this particular case insofar as the appellee City of Tacoma is concerned.

CONCLUSION

The appellee City of Tacoma respectfully submits that the conclusions contained in the Brief of the appellee Hulda S. Carlson, found at pp. 31 through 33 thereof, should be sustained by this court. This appellee, City of Tacoma, further submits that the court should apply the doctrine of laches and estoppel to the claim of the appellant as against the appellee City of

Tacoma, and further, that the court should hold that the question sought to be raised here was before the Federal Power Commission some 35 or 40 years ago, and that the action of the appellant constitutes an impermissible collateral attack upon the order of the Federal Power Commission. This appellee earnestly suggests that the only logical outcome of this appeal is an affirmance by this court of the judgment of the lower court.

Respectfully submitted,

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